

THREE TRUSTEES AND A MAJORITY VOTE REQUIRED: SO EASY TO GET IT WRONG

Henque 1273 CC v Du Plessis and Others (2119/2020) [2020] ZAFSHC 160 (7 September 2020)

The judgment deals with disputes that arose when a Trust purported to cancel one agreement of sale and proceeded to sell the property to a next purchaser. The disgruntled first purchaser, in an attempt to interdict transfer to the second purchaser raised the argument that the Trust was not properly before the Court as the resolution, signed by two of the three trustees (the trust document requiring a majority vote), was inadequate. The question answered here is whether in such circumstances, if two trustees, constituting the required majority, agree on action to be taken, is the input of or meeting with the third trustee at all necessary? The outcome is significant for every trustee acting on behalf of a trust, whatever the transaction.

The Judgment can be viewed [here](#).

FACTS

The WCE Trust ('the Trust') sold the farm Rustkraal to Henque 1273 CC (Henque). Henque took occupation of the property in terms of the agreement and paid occupational rent of R15,000 per month.

Henque did not strictly adhere to the time frames for payments. Ultimately it did make the required payments and issued the requisite guarantee in respect of the purchase price.

Transfer was, however, delayed due to a query raised by Henque in respect of the capacity of a water pump on the farm. After numerous letters being exchanged between the seller and purchaser's legal representatives, the Trust provided the documentation in respect of the water capacity of the pump, to the satisfaction of Henque. In the correspondence that flowed between the legal representatives, several further issues were raised regarding, amongst others, compliance with the agreement by the respective parties, the way forward if the water issue was not adequately resolved to the satisfaction of Henque and a demand for fulfilment of the payment terms stipulated in the contract.

Later, when Henque requested transfer of the property into its name, the Trust informed it that it had already cancelled the agreement and had in fact sold the property to a third party.

A dispute then arose between Henque and the Trust as to whether the agreement had been properly cancelled. Henque alleged that the Trust had elected to enforce the agreement and was therefore not permitted to change that election. The Trust, for its part, alleged that Henque failed to comply with the terms of the agreement and had indicated its intention to cancel the agreement.

The Trust refused to hold off on the transfer of the property to the third party, pending Henque instituting an action in order to resolve the dispute about whether the agreement had been cancelled or was still in force. This precipitated the launch of an urgent application by Henque for an interdict to prohibit the Trust to proceed with registering transfer.

An interim interdict was granted in Henque's favour and the present matter deals with the return day, following on that interim order, where the Trust had to show cause why it should not be finally interdicted from transferring the property to the third party pending the action to be instituted by Henque (in respect of the continued existence or not of the agreement it had concluded with Henque).

(For this report, the only aspects of interest is the point made regarding the capacity of the trustees of the Trust to defend the matter. Only these aspects are dealt with below.)

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Henque disputed the *locus standi* of the Trust's deponent, Mr W C E Du Plessis, to oppose this application on behalf of the Trust, alleging that the resolution purporting to give him the authority to do so was defective.

HELD

The trust resolution

- The Trust had three trustees, only two of whom signed the resolution authorising one of the trustees, W C E Du Plessis (du Plessis), to sign all affidavits and documents necessary to oppose the application. Although the name of the third trustee, G J Oberholster and a space for him to sign are printed on the resolution, it was not signed by him. Printed in capital letters on the resolution were the words "Moet deur alle trustees geteken word", which, loosely translated, mean "must be signed by all trustees". The resolution was, furthermore, not dated.
- Henque contended that it is a trite principle of trust law that, in the absence of a contrary provision in the trust deed, the trustees of the trust must act jointly if the trust estate is to be bound by their acts. The rule derives from the nature of the trustees' joint ownership of the trust property. Since co-owners must act jointly, trustees must also act jointly.
- The Trust maintained, on the other hand, that Du Plessis was authorised to oppose the application as the trust deed stated where there were more than two trustees, decisions/resolutions taken by a normal two thirds majority will be valid. The Trust contended that therefore, as the resolution was taken by two of the three trustees in office, that constituted compliance with the provisions of the trust deed.
- The Trust's argument could not hold.
 - (i) Firstly, a trust does not have legal personality. The trust estate, which is an accumulation of assets and liabilities, is a separate entity and vests in the trustees who administer such trust estate, as specified in the trust deed. The latter document sets out the details of who the trustees are, how many they number, what their powers are and how they may bind the trust. *The trust cannot be bound beyond the provisions of the trust deed.*
 - (ii) Secondly, in the absence of authorisation in the trust deed, trustees must act jointly. The trust deed in this matter authorises a valid resolution to be taken by two trustees, where there are three or more trustees in office. However, in the present instance, the purported resolution was not dated and there was no indication that a meeting was, in fact, held, at which the trustees were present. It is, therefore, not known whether the third trustee was present at the meeting, if it was held, or what his view was with regard to opposing this application. There was also no indication whatsoever of whether he was aware of the application and the opposition to it and whether he would have endorsed the resolution or not. Our courts have held that it was imperative for a minority trustee to be kept informed of the meeting, the agenda and proposed resolution, so that he could have exercised the various options open to him in making known his views. Even if he disagreed and voted against the resolution, he would have been outvoted two to one, and the resolution would have been validly taken. The complete avoidance of this aspect by the trustees in the present matter created a strong impression that the meeting was never held and that the third trustee may well have been unaware of the resolution. (Had a copy of the minutes of the meeting or a confirmatory affidavit by the third trustee been lodged with the Court, the Court may have been in a position to deduce that the third trustee did in fact participate in the taking of the resolution.)
- The resolution therefore could not have been validly taken, and W C E Du Plessis could not have been validly

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authorised the opposition to the present application on behalf of the Trust.

CONCLUSION

The interdict was accordingly made final.